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## The Supreme Court in Politics

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## THE SUPREME COURT IN POLITICS

*Terrance Sandalow\**

BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA. By *Ethan Bronner*. New York: W.W. Norton. 1989. Pp. 12, 399. \$22.50.

Despite all that has been written about the bitter struggle initiated by President Reagan's nomination of Robert Bork to a seat on the Supreme Court, its most remarkable feature, that it was waged over a judicial appointment, has drawn relatively little comment. Two hundred years after the Philadelphia Convention, Hamilton's "least dangerous" branch — least dangerous because it would have "no influence over either the sword or the purse, no direction either of the strength or the wealth of the society, and can take no active resolution whatever"<sup>1</sup>—had come to occupy so important a place in the nation's political life that the question of its future course was capable of generating a controversy more intense and more divisive than all but a very few contests for political office.

In the summer of 1987, when Judge Bork was nominated, the United States was plagued by foreign trade and budget deficits that arguably marked the beginning of a long-term economic decline. Hundreds of thousands, perhaps millions, of Americans were homeless, the most visible symptom of the still unsolved problem of widespread poverty in the midst of plenty. Despite important progress in civil rights during the previous twenty-five years, the besetting issue of race persisted, amid signs that the conditions of life and future prospects of a large segment of the black population were deteriorating. Both the educational and medical care systems were widely acknowledged to require significant repair.

The likely influence of the Supreme Court on these and other vital issues facing the nation ranges between negligible and nonexistent.<sup>2</sup> Yet, President Reagan declared that securing Bork's confirmation would be his highest domestic priority during the remainder of his term (p. 214). The implicit judgment about the importance of the appointment might be discounted on the ground that Reagan was a

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1. THE FEDERALIST No. 78, at 521, 523 (A. Hamilton) (J. Cooke ed. 1961).

2. Racial issues are perhaps an exception, but because of increased black political power and the character of the problems that must be confronted now and in the years ahead, the judiciary's influence on the way those issues are addressed is likely to be far less in the future than it has been for the past several decades.

"lame duck," presiding over an administration weakened by scandal and bereft of ideas for addressing the nation's problems. Still, others thought the appointment even more important than he did. In a full-page ad published in leading newspapers, Planned Parenthood declared that "[t]he Senate vote on Bork may be more important than the next presidential election."<sup>3</sup> The authors of the ad may have been overwrought because they feared that Judge Bork's appointment would threaten continued constitutional protection for the reproductive freedoms that Planned Parenthood exists to promote, but just a few years earlier, in a calmer moment, Laurence Tribe had written that "much more might . . . be at stake in . . . nominations [to the Supreme Court] than in nearly *anything* else that might be done — or undone — by the President who took . . . office on January 20, 1985."<sup>4</sup> The reason, Tribe went on to explain, is that "fundamental choices about what sort of society we wish to become turn on *who* sits on the Court."<sup>5</sup>

Perhaps these extravagant assessments of the significance of a Supreme Court appointment should all be attributed to a myopia produced by the special circumstances and positions of their authors. Similar judgments were, however, a commonplace of newspaper editorials, television talk shows, and myriad casual conversations among the attentive public. Yet, few seemed to notice how remarkable it is that the appointment of a Supreme Court justice should be thought to have such importance. Judicial review of the constitutionality of legislation, once a distinctive feature of American government, is now a relatively common practice in democratic nations. Yet, surely there is no other country in which a judicial appointment would be thought to have anything like the significance that so many people now attribute to a Supreme Court appointment.

The reason so many Americans have come to regard the composition of the Court as so important is not shrouded in mystery. During the past several decades, the Court has found in the Constitution answers to an extraordinary variety of questions of public policy. Issues traditionally regarded as within the domain of Congress and state legislatures are now decided by courts, not only by the Supreme Court of course, but nevertheless within a framework that it establishes. The Court has thus emerged as one of the major policymaking institutions of American government. Even those who believe, as I do, that the importance of its decisions is often greatly exaggerated are bound to recognize that it exerts considerable influence over wide areas of life.

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3. *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. of the Judiciary, United States Senate, 100th Cong., 1st Sess. 4453 (1989) [hereinafter Hearings].*

4. L. TRIBE, *GOD SAVE THIS HONORABLE COURT* ix (1985).

5. *Id.* at xviii.

And since there is no greater consensus about the appropriate direction of constitutional law than there is about the directions in which the nation should move in other arenas of public policy, the question of who should sit on the Supreme Court takes on the same importance as the question of who should occupy other significant policymaking offices.

However remarkable it may be that judges should have such power, once they do it is all but inevitable that their selection will at times become a matter of intense public interest. As the domain of constitutional law expands, and the bases of constitutional decisions are seen to approximate those of other policy decisions,<sup>6</sup> citizens accustomed to participating in the election of their political leaders understandably will expect to participate in the selection of Supreme Court justices. It should occasion no surprise, therefore, that the question whether Judge Bork should be confirmed led to a campaign strongly resembling a campaign for high political office.

Since 1960, when Theodore White published his first *Making of the President*, post-mortems of presidential campaigns have become a journalistic staple. Fittingly, we now have two books that recount the battle fought over the Bork nomination.<sup>7</sup> One of them, *The People Rising*, by Michael Pertschuk and Wendy Schaetzel,<sup>8</sup> considers only the campaign conducted by those who opposed the nomination. Both authors are associated with the Advocacy Institute, which they describe as an organization "dedicated to capturing and disseminating learning about citizen advocacy in order to strengthen the capacity of all citizen groups effectively to pursue their own visions of truth and justice,"<sup>9</sup> a description whose accuracy depends upon excluding from the class of "all citizens" those whose "visions of truth and justice" do not coincide with the currents of contemporary liberalism. Among Pertschuk and Schaetzel's stated objectives in writing the book are, first, "to help those who would understand or *be* effective citizen advocates to learn the lessons drawn from the campaign,"<sup>10</sup> and second, to assess the importance of the campaign in securing Bork's defeat.<sup>11</sup> What they have written, instead, is a paean to the "adept," "prudent," "wise," "brilliant," "warm," "direct," "pragmatic," dedicated, selfless men and women of uncommon vision who led the campaign, those

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6. See Nagel, *Political Law, Legislative Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643 (1989).

7. Judge Bork has also undertaken to write about the controversy, but only in the context of a book devoted mainly to questions of constitutional theory. R. BORK, *THE TEMPTING OF AMERICA* (1990).

8. M. PERTSCHUK & W. SCHAETZEL, *THE PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION* (1989).

9. *Id.* at xi.

10. *Id.* at 8.

11. *Id.* at 9.

whom they describe, without intended humor, as "a guerrilla band of citizens lobbying for liberty."<sup>12</sup>

Books about campaigns, Maureen Dowd recently wrote in reviewing a book about the Dukakis campaign, are of interest chiefly to those who are mentioned, and even they "will be sufficiently satisfied by a scrutiny of the index, and a look at the passages about themselves."<sup>13</sup> Read in this way, *The People Rising* should be a thoroughly enjoyable experience, not only for individuals mentioned, but also for their mothers. The only others to whom the book might be recommended are those in whom the title produces a shiver of excitement.

I do not mean to suggest that readers who do not fit within these categories will find nothing of interest in the book. One learns from it, for example, that many of Nan Aron's female relatives "were very feisty women" who "were involved in social movements" and that her daughters, one named for Emma Willard and Emma Lazarus and the other for an aunt active in the civil rights movement, "give every indication of following the same path."<sup>14</sup> So too, one discovers that Melanne Verveer spends so much time on the telephone that her co-workers presented her with a toy telephone at their organization's annual Christmas party.<sup>15</sup> On a more analytic level, Pertschuk and Schaetzel's study reveals that hard work, willingness to put aside personal and organizational interest, and communication — even with "difficult" people<sup>16</sup> — are important in building a coalition. Perhaps even more startlingly, it also reveals that there are people "beyond the Beltway" who are well-informed and have useful ideas.

"The germ of this book," the authors write in a concluding bibliographic essay, "was a class project in a course at New York University Law School on public interest non-litigative advocacy."<sup>17</sup> It is probably too late to wonder why a university would offer such a course, but the hope may at least be expressed that, if the course is offered again, *The People Rising* will not be a required text.

Ethan Bronner's<sup>18</sup> *Battle for Justice*, in sharp contrast with *The People Rising*, is an engagingly told and solid journalistic account of

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12. *Id.* at 7. This "guerrilla band," as their own book reveals, included many of Washington's most seasoned political operatives, the leadership of powerful national organizations, leading members of the bar, and many of the Senate's most influential members.

13. Dowd, *Return of the Living Dead*, THE NEW REPUBLIC, Dec. 11, 1989, at 44-45.

14. M. PERTSCHUK & W. SCHAETZEL, *supra* note 8, at 47.

15. *Id.* at 56.

16. *I.e.*, people who are "prickly, garrulous, petty, negative (and draining), distrustful (if not paranoid), righteous, self-important, [and] unlovable." *Id.* This conclusion does not seem to have emerged from the authors' investigation of the campaign against Judge Bork since, on the evidence of their book, there appear to have been no such people in the coalition that opposed confirmation.

17. *Id.* at 306.

18. Bronner reports on the Supreme Court and legal affairs for the *Boston Globe*.

the controversy. Although his sympathies can be discerned — they are not with Bork — they are kept well under control. With admirable clarity, Bronner takes the reader through the President's decision to nominate Bork, the campaign waged on both sides, the hearings before the Senate Judiciary Committee, the Senate debate, and the aftermath: the ill-fated nomination of Judge Ginsburg and the appointment of Justice Kennedy. Background information about the major participants, the Court, and the controversies surrounding its decisions is skillfully woven into the story. Lay members of the reading public and the many lawyers whose work does not require close attention to the Court are the book's natural audience, but even Court-watchers who followed the controversy — can there be any who didn't? — may find it a stimulant to reflection on an episode that may open a new chapter in the Court's history.<sup>19</sup>

Despite the strengths of Bronner's account, disagreements and disappointments with it are bound to occur. My own center on what might be called the "Republican side of the story." The book does not, for example, shed much light on the question of why Bork was nominated. To be sure, Bork's professional credentials and intellectual qualifications were outstanding, as impressive as those of any nominee in a good many years and more impressive than most. Although that circumstance was presumably not irrelevant to the President's decision to nominate him, it would be naïve to suppose it was decisive — or even a very influential consideration. Of greater importance, surely, was Reagan's commitment to appointing justices who shared his Administration's constitutional philosophy. One suspects, moreover, that the President and his advisors were less interested in the abstractions of constitutional theory than in Bork's well-known disagreement with various decisions of which they also disapproved — most notably, of course, *Roe v. Wade*<sup>20</sup> and its progeny.

Perhaps there is nothing more to be said about the decision. As Bronner reports, however, Reagan knew that Bork would be an exceptionally controversial nominee, vehemently opposed by forces that were bound to have an important influence upon the Senate's Democratic majority: "pro-choice" groups (p. 26) and the civil rights community that just two years earlier had blocked William Bradford Reynolds' promotion to Associate Attorney General.<sup>21</sup> Indeed, the public campaign against Bork began even before the nomination was announced (pp. 37-38). Reagan's respect for the intense opposition that Bork would engender had been demonstrated just a year before

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19. See *infra* text accompanying notes 35-39, 75-92.

20. 410 U.S. 113 (1973).

21. Pp. 48-50. Several days before Bork's nomination, Ralph Neas, Executive Director of the Leadership Conference on Civil Rights, had informed a high-ranking White House staff member that the selection of Bork would "cause a fire storm." P. 36.

when, in what Bronner characterizes as “a complex political calculation” (p. 32), he passed over Bork and named Antonin Scalia to fill a vacancy on the Court even though Republicans then controlled the Senate.

Since in 1987, as in 1986, there were other possible nominees who, though less controversial than Bork, held similar views, the inevitable question is why Bork was nominated. Bronner’s account is too thin to shed light on the answer. He does report that as soon as Justice Powell’s retirement became known, conservatives in the Justice Department and staff members of what he dubs “ultraconservative lobbies” (p. 28) mounted a campaign on behalf of Bork, whom they appear to have regarded as an important symbol in their efforts to reshape the Court. Rightly concerned that the more moderate and more pragmatic Howard Baker, recently installed as White House Chief of Staff, would favor a less controversial nominee, they looked to Attorney General Edwin Meese to press for Bork’s nomination. Meese did make his views known to the President — we are not told what they were — but Bronner was apparently unable to penetrate whatever deliberations took place among Reagan, Meese and other high-level advisors. In the end, therefore, the book provides no information about the calculations that entered into the decision to nominate Bork rather than someone who would just as surely help to change the Court’s direction, but who would engender less opposition (pp. 28-33).

My own speculation — obviously it is no more than that — is that Reagan and his closest advisors did not mind the controversy and may have welcomed it. Just because Bork had become a symbol, the nomination offered an embattled administration an opportunity to begin drawing battle lines for the next election, which was little more than a year away, and to activate important elements of Republican strength, ideological conservatives and the “anti-abortion” movement. Whether the nomination succeeded or was defeated, it would be a sharp reminder of the importance of the power to appoint members of the Court. I do not mean to suggest that the President anticipated defeat, but the failure of the Reynolds nomination must have alerted him to the possibility, and the risk must have seemed worth taking.

If these were the President’s calculations, however — indeed, even if they were not — the Administration behaved very oddly in the months ahead. Between July 1, when the nomination was announced, and the commencement of the Judiciary Committee hearings in mid-September, opponents of confirmation were engaged in a massive campaign to arouse public sentiment against Bork and thereby exert pressure upon the twenty to thirty Senators whose votes were not fully predictable. The Administration, however, proceeded as though this were a routine, if somewhat controversial, nomination in which undecided Senators would cast their votes on the basis of the record, unin-

fluenced by public opinion. The President did support the nomination in a few speeches, though no major ones, but the Administration seemed mainly intent upon damping controversy.<sup>22</sup> Bronner reports that the White House, which was managing the campaign, discouraged conservative groups from becoming too publicly involved (p. 200), presumably to avoid fueling the charge that Bork was a "right-wing" ideologue. To counter that claim, it emphasized his credentials and, astonishingly, attempted to cast him as a "moderate" in Justice Powell's image.

The strategy, though disingenuous, may have made some sense at the outset. The undecided Senators were themselves "moderates" who might be won over by assurances that Bork was not a right-wing ideologue. Moreover, if the controversy could be contained within Washington, confirmation seemed likely, in part because presidential nominations have an inertial force and, as Bronner suggests, perhaps also because Bork, a Washington "insider," might be expected to win an "inside" contest (p. 157). Within a month or six weeks of the nomination, however, it was apparent that the opposition had succeeded in its effort to take the issue to the country. Whether Bork should be confirmed was no longer just an "insider's" question. Yet, the White House did not alter its strategy in response to the new reality, a failure that Bronner does not adequately explain.

The failure, it seems to me, was largely an intellectual one, an inability to devise a strategy that would rouse public support for Bork as intense as the opposition that had been aroused against him,<sup>23</sup> without fueling the charge that he was a conservative zealot and thereby risking the loss of Senate moderates. Although plainly in tension, the two objectives were not irreconcilable. The Administration need only have pursued a course roughly opposite to that taken by the anti-Bork forces. The leadership of the anti-Bork coalition had decided early on "to avoid the *A* words — abortion and affirmative action"<sup>24</sup> and to emphasize instead "privacy" and "civil rights." The tactic not only enabled them to avoid issues on which they were politically vulnerable

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22. The attempt is not necessarily inconsistent with the speculation that Reagan may have welcomed the controversy. Responsibility for securing Bork's confirmation fell to Howard Baker, who apparently did not play a major part in the nomination decision. Attorney General Meese, who is likely to have had an important influence on the nomination decision, did not actively participate in the struggle over confirmation, apparently because he was occupied by his own difficulties. P. 35. It seems entirely plausible, therefore, that the nomination decision and the effort to achieve confirmation might have been grounded in quite different premises.

23. Bork did have a considerable amount of public support — Senators actually received more mail supporting confirmation than opposing it (p. 201) — but it lacked the intensity of the opposition. Senator John Breaux of Louisiana captured the difference precisely when he told a meeting of Southern Democrats that "[i]f you vote against Bork, those in favor of him will be mad at you for a week. But if you vote for him, those who don't like him will be mad at you for the rest of your lives." P. 287.

24. P. 160 (quoting Ricki Seidman of People for the American Way (PAW)); see also M. PERTSCHUK & W. SCHAEZEL, *supra* note 8, at 128.



and to capture two powerful rhetorical symbols, but also to focus attention on Bork's criticisms of decisions such as *Griswold v. Connecticut*,<sup>25</sup> *Shelley v. Kraemer*,<sup>26</sup> and *Harper v. Virginia Board of Elections*,<sup>27</sup> making it appear that his confirmation would somehow serve to reopen controversies that had long since been settled.

The obvious course for the Administration was to circumvent the opposition's strategy by using the issues the latter feared to build a base of more passionate public support for the appointment. The message the Administration needed to convey was not a very complicated one. It was simply that the live issue of "privacy" was not contraception, as the opponent's emphasis on *Griswold* suggested, but abortion, and that the pressing "civil rights" issue was not the validity of restrictive covenants, poll taxes, or literacy tests, but the use of racial "quotas." A campaign emphasizing abortion and racial quotas might not have been welcomed by Senate moderates, but it need not have alienated them. It might well have moved some, perhaps especially Southern Democrats, in Bork's direction, drawing attention away from the concern that his appointment would reopen old wounds and, probably more significantly, imposing a high price on a vote against confirmation. Southern Democrats were under intense pressure from black constituents, to whom many owed election. The pressure might be overcome, if at all, only by arousing emotions among Bork's supporters that were as intense as those that had been aroused in his opponents.<sup>28</sup>

The Administration's failure to mount a massive public campaign emphasizing abortion and affirmative action was, in a number of ways, fortunate. A campaign along those lines would surely have added to the divisiveness of the controversy and it could easily have degenerated into ugliness of a kind that marred the campaign against Bork.<sup>29</sup> But the failure to conduct such a campaign may well have cost Bork the appointment.<sup>30</sup>

In the end, the Administration failed to develop any theme in sup-

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25. 381 U.S. 479 (1965) (holding state statute prohibiting use of contraceptives invalid under the fourteenth amendment).

26. 334 U.S. 1 (1948) (holding state court enforcement of racially restrictive home sale covenants to be violative of the fourteenth amendment).

27. 383 U.S. 663 (1966) (holding poll tax to be violative of the equal protection clause of the fourteenth amendment).

28. See *infra* text accompanying notes 40-60.

29. See *infra* notes 43-61 and accompanying text.

30. In an interview some time after the Senate vote, Howard Baker is reported to have said that "I can't think of a single vote Bork would have gotten if we had had a mobilization of conservative rhetoric on those issues," referring to civil rights and the expansion of individual rights by the Warren and Burger Courts. Although acknowledging that the statement was self-serving, Bronner opines that "it seems right," a judgment he supports by invoking a poll conducted by the anti-Bork coalition which found that "Americans would be inclined by overwhelming margins to disapprove of a prospective Supreme Court candidate who had criticized

port of the nomination, save for the bland ones that Bork was exceptionally well qualified and that he was not the extremist his opponents sought to depict. The effects of that failure were palpable in the Judiciary Committee hearings. By the time the hearings began, of course, the issue may already have been decided. Despite occasional protestations that the Senate's judgment would be made "on the record," the rising tide of public opposition had very likely determined the votes of most undeclared Senators. What the hearings offered, at most, was a last-ditch opportunity to sway public opinion, mainly by intensifying Bork's political support. Their effect, however, was to solidify the opposition.<sup>31</sup> Senators who opposed confirmation effectively employed the hearings to hammer away at themes for which the public and the media had been prepared by the campaign waged during the preceding months.<sup>32</sup> Bork's supporters on the Committee lacked a similar platform. For that reason, among others, they were singularly ineffective.

Bronner's account of the hearings, although excellent in many respects, is flawed by his failure to deal with the inadequacies of Bork's supporters on the Committee. He covers their performance mainly in a chapter, entitled "Missed Opportunities," that focuses on a number of gaffes Bork committed while testifying and on Bork's failure to respond effectively to a number of "soft pitches" fed to him by Republicans. The impression it conveys is that Bork alone was responsible for the failure to turn the hearings to his advantage. But though Bork did commit some gaffes and did at times respond ineffectively — *e.g.*, by failing to give answers that would provide good "sound bites" on the evening news<sup>33</sup> — the hearings might well have played differently had Committee Republicans provided more adequate support or, to put it more bluntly, had they not been hopelessly outclassed by their Democratic counterparts.

A portent of their performance at the hearings was provided shortly after the nomination when Strom Thurmond, the ranking Republican, consented to Chairman Joseph Biden's decision to postpone the hearings until mid-September (p. 229), thereby giving critics of the nomination the time they required to mount a public campaign. Once the hearings began, Thurmond and other Committee Republicans con-

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recent civil rights gains or revealed a reluctance to acknowledge a constitutional right to privacy." P. 348.

The question, however, is not whether Americans generally approved of recent gains by minorities or of a generalized right to privacy, which they had been led to believe was the only reason contraceptives are legally available, but whether large numbers might have been mobilized by a more particularized appeal directed to abortion and affirmative action. My characterization of the Administration's failure as "intellectual" rests precisely on its failure to perceive that distinction.

31. Surveys of public opinion revealed that opposition to confirmation rose during the hearings. *See* pp. 301, 308.

32. *See infra* notes 40-61 and accompanying text.

33. *See infra* text accompanying notes 86-89.

tinued to be inattentive to the politics of the situation. Apparently without objection from Republicans, surely without public cries of unfairness, Democrats were permitted to time the appearance of witnesses to maximize the television exposure of those opposed to the nomination and to deny coverage to those who supported it. At one point, Thurmond even acceded to a request by Senator Edward Kennedy to defer testimony by witnesses who favored nomination in order to hear two opponents whose testimony was intended to cast doubt on the veracity of Bork's account of the events leading to the appointment of Leon Jaworski as Watergate Special Prosecutor,<sup>34</sup> thus facilitating coverage of the latter on the network news.

The Republicans' ineptness continued into the questioning of witnesses. In contrast with the Democrats, whose questions exhibited both an awareness that the purpose of the hearings was to influence public opinion and a strategy for doing so, the Republicans were, in the main, defensive and unfocused. In part, their ineffectiveness was attributable to the Administration's failure to develop a powerful affirmative theme in support of the nomination, but it was also of their own making. Bronner reports, for example, that Senator Biden had spent days with academic and other experts being coached on substantive issues that would arise at the hearings (p. 210). There is no report of similar preparation by any of the Republicans, and a review of their questioning suggests that there was none. Often, their questions merely served to provide opposition witnesses with additional opportunities to make the case against Bork. Follow-up questions that might have put the latter's answers in an unfavorable light went unasked. And while Democrats continued to drive home the point that average citizens had an important stake in the outcome of the controversy, Republicans too often raised points that were unlikely to interest anyone. Senator Alan Simpson, for example, continually returned to the silly claim that holding Bork responsible for positions taken in his academic writings would chill professorial expression.

The central chapters of the nomination story are not, however, those that deal with what Bork's Republican supporters did or did not do, but those involving the campaign waged against confirmation. Shortly after his resignation from the Court of Appeals, Judge Bork rightly said that the controversy over his nomination had led to "the first all-out political campaign with respect to a judicial nominee in the country's history" (p. 341). To be sure, controversy over Supreme Court nominations is not all that unusual. Approximately one fifth of all nominees have not been confirmed,<sup>35</sup> including five since 1968. No

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34. *Hearings*, *supra* note 3, at 3192-93 (testimony of George Frampton and Henry Ruth); see also *id.* at 3190-91.

35. L. TRIBE, *supra* note 4, at 78. For a complete list of nominees and the action taken on them through 1985, see *id.* at 142-51.

previous confirmation controversy, however, involved an appeal to the public on the scale that occurred in the controversy over Judge Bork, an appeal that very nearly converted the confirmation process into a referendum on his appointment. But though the process leading to Bork's rejection by the Senate was unprecedented, signs that the nation was heading toward greater public participation in the selection of Supreme Court Justices have been appearing for years. Most obviously, five of the eleven nominees during the twenty years preceding the Bork nomination aroused public controversy and efforts to bring public opinion to bear on the Senate.<sup>36</sup> At least in retrospect, moreover, there were also other signs — the volume of mail now received by members of the Court,<sup>37</sup> demonstrations aimed at informing the Court of the demonstrators' views on pending cases, and increased media attention to the work of the Court, including in several instances massive news blitzes in anticipation of important cases equivalent to those that occur, on rare occasion, when issues of great national import are under consideration by the political branches.

Although unprecedented, therefore, the campaign waged against confirmation may not be a historical anomaly, but the opening of a new chapter in the Court's history. To suggest that possibility is not, of course, to suggest that every nomination will be as controversial or will lead to a similar campaign. Presidents will, at times and perhaps often, wish to avoid controversy rather than to stimulate it. The Senate may be controlled by the president's party, significantly reducing the prospects for a successful campaign against confirmation. But the underlying source of the dispute over the Bork nomination — the controversial character of the Court's decisions and their importance in shaping national policy — did not end with his defeat.<sup>38</sup> The lesson to be drawn from the campaign against confirmation is that citizens can be mobilized on the issue of Supreme Court appointments. That lesson is not likely to be forgotten as long as the Court continues to play the role that it has during the past several decades. A look at the campaign may, therefore, provide a preview of the future. It may also raise questions about the wisdom of assigning that role to the Court.<sup>39</sup>

Reports on the cost of the campaign differ widely, even wildly.

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36. The five nominations are those of Abe Fortas, Clement Haynsworth, G. Harold Carswell, and William Rehnquist (twice). Both that number and the total of eleven exclude the nomination of Homer Thornberry, on whose nomination no action was required because of Justice Fortas' failure to win confirmation as Chief Justice.

37. Justice Blackmun has said that he has received over 50,000 letters regarding abortion.

38. My point here is not that the Court's role is controversial, but that its decisions are. A few law professors and perhaps some other odd people may worry about whether courts or legislatures should determine whether or under what circumstances women should have the freedom to obtain abortions, whether racial preferences should be employed, or other issues of consequence, but the general public is largely oblivious or indifferent to that and other questions of governmental structure. Their concern is with the substantive resolution of the issues.

39. See *infra* text accompanying notes 75-92.

Bronner concludes that "all the anti-Bork groups together did not spend more than a few million dollars."<sup>40</sup> Several weeks before the hearings, however, *Time* projected that the combined expenditure of groups on both sides would exceed \$20 million, an estimate supported by a *New York Times* report that anti-Bork forces had raised \$12 million and pro-Bork forces \$6 million by the time the hearings began.<sup>41</sup> Whatever the cost, it is clear that the anti-Bork coalition ran a campaign that employed many of the highly sophisticated techniques of modern political campaigns. Focus groups and public opinion polls were employed to ascertain the issues that could best be exploited.<sup>42</sup> "Actualities," radio spots that sound like news, and "video news releases," an equivalent product for television, were "meticulously produced and aggressively promoted" (p. 146). Media consultants were retained to manage relationships with reporters and editors, to monitor trends in media coverage, and to assist in devising a strategy for gaining favorable coverage. Among the lessons taught by the consultants was that paid advertisements can be an effective technique for achieving the latter goal. Advertisements, it seems, are understood by editors and producers as a token of the seriousness of a campaign and, if sufficiently catchy or controversial, may themselves become news, thereby generating free publicity (p. 149).

The techniques employed by the campaign are, however, of less interest than its substance, although there is no doubt some relationship between the two. "Actualities," "video news releases," and catchy newspaper advertisements are not ideal vehicles for discussing complex issues. Technology, however, is not responsible for the characteristics of the campaign that led political columnist David Broder to describe it as a "lynch[ing]"<sup>43</sup> and the *Washington Post*, which opposed the nomination, to condemn it for its "intellectual vulgarization and personal savagery . . . profoundly distorting the record and the nature of the man."<sup>44</sup> Among its more troubling aspects is what it reveals about contemporary American liberalism. Liberalism in American politics was once defined not only by a progressive social agenda, but by a commitment to decency in political life. The cam-

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40. P. 147. The figure apparently does not include expenditures for which there would be no separate accounting, such as the salaries of the substantial number of people participating in the campaign who were already on the payrolls of the many organizations that made up the coalition.

41. Lamar, *Defining the Real Robert Bork*, TIME, Aug. 24, 1987, at 16; see also Berke, *Fundraisers: Bork as a Bonanza*, N.Y. Times, Sept. 11, 1987, at A20, col. 6.

42. P. 158. The issue of "balance" on the Court was abandoned, for example, when a poll revealed that only one third of Americans knew that the Court has nine members. *Id.* Similarly, the poll made clear that abortion should not be emphasized because it was a divisive issue. P. 159. Conversely, the polls revealed that Bork's decision in the *American Cyanamid* case could be crafted into an effective weapon. See *infra* notes 54-59 and accompanying text.

43. M. PERTSCHUK & W. SCHAETZEL, *supra* note 8, at 208.

44. *The Bork Nomination*, Wash. Post, Oct. 5, 1987, at A14, col.1.

campaign waged against Bork reveals how far we have come from that time. The objectionable features of the campaign, it is worth emphasizing, were not the work of individuals and groups on the fringe, but of political leaders and organizations that are at the center of contemporary American liberalism. Pertschuk and Schaetzel report, on the basis of extensive interviews with participants in the campaign, that the latter are "secure in the ethical standards to which they had held themselves."<sup>45</sup> If their report is accurate, they have revealed more about the participants than they intended.

Senator Kennedy opened the campaign within hours of the President's announcement of the nomination. "Robert Bork's America," Kennedy declared in a televised statement from the Senate floor, is a land in which women would be forced into back alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, school children could not be taught about evolution, writers and artists could be censored at the whim of government, and the doors of federal courts would be shut on the fingers of millions of citizens for whom the judiciary is — and is often the only — protection of the individual rights that are the heart of our democracy.<sup>46</sup>

Kennedy's contribution to public understanding of the issues raised by the nomination was a harbinger of the campaign that followed.

A series of ads run by organizations that played a leading role in the campaign is illustrative. The National Abortion Rights Action League published an ad in leading newspapers that opened with the following: "*You wouldn't vote for a politician who threatened to wipe out every advance women have made in the 20th Century. Yet your Senators are poised to cast a vote that could do just that.*" The ad went on to suggest that Bork's views are even more retrograde than its opening statement indicates, emphasizing in bold print that "[t]he Supreme Court nominee doesn't think vital Constitutional guarantees apply to women."<sup>47</sup>

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45. M. PERTSCHUK & W. SCHAEZEL, *supra* note 8, at ix.

46. P. 98. It would be tedious to detail all the distortions and misrepresentations in this brief paragraph and in the other statements quoted hereafter. Those who read this review — not the audience the statements were intended to influence — will have no difficulty making them out. It may be worth pointing out, however, that Bork appears never to have addressed several of the issues — e.g., the teaching of evolution and "midnight raids" — mentioned in Kennedy's statement and that he had long since abandoned positions — e.g., opposition to the Civil Rights Act of 1964 — that might have provided a modicum of support for some of Kennedy's assertions. See *infra* note 60.

In the course of a speech given at about the time of the Senate hearings, I said that I did not know whether Kennedy's statement reflected ignorance or a deliberate effort to deceive the public, but that I could think of no other alternative. Bronner suggests one: indifference to the truth or falsity of the assertions. "The statement," Kennedy said subsequently, "had to be stark and direct so as to sound the alarm and hold people in their places until we could get material together." Bronner observes that Kennedy "never apologized for the statement. It had a function." P. 100.

47. *Hearings*, *supra* note 3, at 4452. And again, Bork's "expedient reading of the Constitu-

Another ad, this one run by the National Education Association (NEA), revealed that women were not the only citizens at risk if Bork were confirmed. The ad stated the views of the NEA's president, Mary Hatwood Futrell,<sup>48</sup> who began, reasonably enough, by observing that she was deeply troubled by Bork's embrace of the doctrine of "original intent." She then went on to explain:

Had America held tight to the doctrine of original intent, I would today not be a teacher. Nor would most of my colleagues. I would not be a citizen. Nor would most of you. And many of us would be chattel — items at public auction. America would be a land of a propertyless majority ruled by an elite consisting of white, propertied, affluent males. . . .

Fortunately, at critical junctures in our history, the Supreme Court has rejected original intent and chosen instead to bring to life the implicit ideals that constitute the heart of the Constitution.<sup>49</sup>

Planned Parenthood placed ads warning that Bork's appointment threatened rights perhaps even more fundamental than those of citizenship: "*If your Senators vote to confirm the administration's latest nominee,*" the ad declared, "*you'll need more than a prescription to get birth control. It might take a constitutional amendment.*" Warming to the attack, the ad went on to label Bork an "extremist" who uses "obscure academic theory to arrive at positions that he himself admits may appear 'bizarre'" and who "sees the Court not as a problem-solver, guided by past decisions, but as a reckless trouble-maker, aggressively seeking ways to upset past rulings he thinks are wrong. Regardless of the social havoc that may result. Or the pain and suffering of innocent people."<sup>50</sup>

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tion allows 'moral majority' extremists to hope they can force their dogma on the rest of us under penalty of law. . . . as if the U.S. Constitution simply didn't apply to women." *Id.*

The claim that Bork thinks (or once thought) the Constitution or some of its provisions — particularly the equal protection clause — does not apply to women was a continuing theme of the campaign, eventually finding its way into the Judiciary Committee's Report. *Id.* at 6231. For an analysis of the claim, see Born, *Robert H. Bork's Civil Rights Record*, *id.* at 1485, 1516-19, and my prepared statement in support of the nomination, *id.* at 3292, 3296.

48. To understand the ad, it must be known that Ms. Futrell is an African-American.

49. Futrell, *An Educator's Opinion: Justice Bork? We Can Do Better*, Wash. Post, Sept. 27, 1987, at D4, col. 2 (advertisement). In fairness, it should be acknowledged that several paragraphs later Ms. Futrell candidly stated that it did not follow from Bork's adherence to the doctrine of original intent that he would "undo the progress toward justice for all that the Court in its finest hours has wrought" or "return us to the judicial America of the 18th Century." *Id.* at col. 3. The decisive questions, she wrote, were whether he would "continue America's steady march toward full rights for all Americans" and whether "America [can] afford to place on the Supreme Court a man whose erudition carries the threat of judicial stagnation." *Id.*

With allowance for the rhetorical flourishes, those were indeed among the decisive — and entirely legitimate — questions raised by the nomination. A campaign directed to them might have made a significant contribution to the formation of an informed public opinion, but among Bork's opponents Ms. Futrell alone was indiscreet enough to mention them publicly. Others assiduously avoided such questions, presumably because raising them would risk focusing attention on the obvious next question: What precisely did Bork's opponents want an "un-stagnant" Court to do to "assure full rights for all?" See *infra* notes 64-65 and accompanying text.

50. *Hearings*, *supra* note 3, at 4453.

People for the American Way (PAW) extended the attack. In an ad headlined "Robert Bork vs. The People," it informed readers that "[r]ecent studies reveal that Judge Bork has already made up his mind that large corporations are nearly always right." To support that rather serious charge it pointed to a study that "found that he favored corporations over consumers 96% of the time,"<sup>51</sup> apparently a reference to a study by Ralph Nader's Public Citizen Litigation Group, a study somewhat marred by the minor methodological flaw of excluding ninety percent of the cases in which Bork had participated.<sup>52</sup> PAW also sponsored a television commercial that featured Gregory Peck warning that "Robert Bork wants to be a Supreme Court Justice but the record shows he has a strange idea of what justice is. He defended poll taxes and literacy tests which kept many Americans from voting."<sup>53</sup>

The willingness of the coalition to play upon public ignorance and fear in its effort to arouse sentiment against Bork is nicely illustrated by its treatment of his decision in *American Cyanamid*,<sup>54</sup> a case in which the sole issue was whether the act of a company in informing fertile women that they might retain their jobs if they underwent sterilization was a "hazard" within the meaning of the Occupational Safety and Health Act. The women held jobs that exposed them to irreducible lead levels harmful to fetuses, and since OSHA requires protection of employees from that risk, the women were to be discharged or transferred.<sup>55</sup> Bork wrote for a unanimous court, sustaining the determinations of both an administrative law judge and the OSH Review Commission that the word "hazards," within the meaning of the Act, was limited to processes and materials and did not encompass the option given to these employees.<sup>56</sup>

Pollsters had found that the decision was an ideal one for the coalition to exploit. "It showed," as Bronner writes, "that Bork opposed women's rights, favored big business, and — get this! — approved of sterilization" (p. 179). When informed of the decision, seventy-seven

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51. *Hearings*, *supra* note 3, at 4454 (advertisement reprinted in statement by Comm. For a Fair Confirmation Process).

52. Pp. 150-51; see also Anthony, *Judge Robert Bork's Decisions in Which He Wrote No Opinion: An Analysis of the Regulatory and Benefit Cases*, in *Hearings*, *supra* note 3, at 1548 (discussing Bork's decisions and participation in business and regulatory cases).

53. *Hearings*, *supra* note 3, at 4455 (reprinting advertisement). Bork had criticized the Supreme Court's decisions in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), and *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), which is not quite the same as defending literacy tests and poll taxes.

54. *Oil, Chemical & Atomic Workers v. American Cyanamid Co.*, 741 F.2d 444 (D.C. Cir. 1984).

55. Counsel for O.C.A.W. conceded at oral argument that the company might lawfully have adopted a policy that only sterile women would be employed in the positions. 741 F.2d at 449-50.

56. 741 F.2d at 449.



percent of those polled said they were "much less inclined" to approve of Bork (p. 178). The coalition knew what to do with that information. PAW informed the readers of its newspaper ad, in a paragraph boldly headed "Sterilizing workers," that

a major chemical company was pumping so much lead into the work place that female employees who became pregnant were risking having babies with birth defects. Instead of cleaning up the air, the company ordered all women workers to be sterilized or lose their jobs. When the union took the company to court, Judge Bork voted in favor of the company.<sup>57</sup>

Planned Parenthood, similarly, wrote that "[i]n a case involving a company which produced dangerous amounts of toxic lead, Bork refused to strike down a company policy which required female employees to become sterilized or to be fired from their jobs."<sup>58</sup> And the National Abortion Rights Action League wrote simply that "[a]ccording to Bork women can be forced to choose between being sterilized and losing their jobs."<sup>59</sup>

Each of the ads contained other misrepresentations and distortions,<sup>60</sup> but those that have been cited are adequate to convey the flavor of the campaign.<sup>61</sup> The extreme rhetoric reflected, in part, a

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57. *Hearings*, *supra* note 3, at 4454.

58. *Hearings*, *supra* note 3, at 4453.

59. *Hearings*, *supra* note 3, at 4452.

60. Among the disturbing elements of the campaign, perhaps especially for those familiar with the McCarthy era, was the dredging up of an article Bork had written in 1963 opposing enactment of a bill that was to become the public accommodations title of the Civil Rights Act of 1964. Bork, *Civil Rights — A Challenge*, THE NEW REPUBLIC, Aug. 31, 1963, at 21. In the intervening years, Bork had not only repudiated his earlier opposition to the legislation, but had abandoned the libertarianism on which the opposition had been based. Pp. 67-70. Compare Bork, *The Supreme Court Needs a New Philosophy*, FORTUNE, Dec. 1968, at 138 with Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). Nevertheless, Bork's opponents repeatedly sought to tar him with the article, a tactic sadly reminiscent of that employed in the 1950s, when individuals who had long since abandoned their earlier Communist sympathies were attacked for positions they had taken two decades earlier.

PAW went further, carefully choosing its words to convey the impression that Bork still adhered to the views he had expressed in 1963 and, indeed, managing even to distort what he said at that time. In the 1963 article, after acknowledging "the ugliness of racial discrimination," Bork had written that the premise underlying anti-discrimination legislation "is that if I find your behavior ugly by my standards, moral or aesthetic, and if you prove stubborn about adopting my view of the situation, I am justified in having the state coerce you into more righteous paths. That is itself a principle of unsurpassed ugliness." Bork, *Civil Rights — A Challenge*, THE NEW REPUBLIC, Aug. 31, 1963, at 22. PAW's ad purported to describe Bork's position on civil rights in a paragraph headed (in bold face) "Turn back the clock on civil rights?" The paragraph continued: "'Unsurpassed ugliness.' That's how Professor Bork described a law that said hotels and restaurants had to serve black Americans. . . . Ask yourself: Should America go back and re-fight settled civil rights battles? If Robert Bork is on the Court, we may have to." *Hearings*, *supra* note 3, at 4454.

61. The calumny of the ads was magnified in a number of ways. Literature produced by local organizations repeated the misrepresentations and distortions and added some of their own. For a sampling, see pp. 179-80; *Hearings*, *supra* note 3, at 4870-71, 4873, 5587. In addition, the claims made against Bork were "news" and as such they received a good deal of attention from the media. Bronner provides a trenchant, if brief, analysis of the reasons that "the charges were

genuine sense of fear and outrage at the prospect of Bork's appointment. During the past several decades, many liberals have come to think of the Court as their branch of government, in much the way that farmers regard themselves as having a special claim on the Agriculture Department, business interests regard themselves as having a special claim on the Commerce Department, and so on:<sup>62</sup> it is, or at least ought to be, their voice in the corridors of power. Paradoxically, the passion with which liberals lay claim to the Court owes much to the belief that they are not an "interest group" like farmers or shopkeepers: they do not look to it merely for the protection of their interests, but for the expression of values and the vindication of rights. Their belief that they have a claim upon the Court thus comes clothed in a moral fervor that interests alone are unlikely to generate. Bork had been openly critical of many of the decisions responsible for this proprietary attitude, reason enough for outrage at the thought he might now sit on the Court.<sup>63</sup> His nomination was an affront.

More was at stake than liberal sensibilities, however. Bork's appointment would threaten, if not doom, the prospects for extending those decisions. The fear that the campaign sought to excite, that Bork's appointment would lead to wholesale reversal of the many decisions he had criticized, was never very realistic. Not only were most of the decisions too firmly woven into the fabric of constitutional law but, probably more significantly, the political will to reopen most of the issues was lacking.<sup>64</sup> The realistic fear, one on which the campaign did not dwell, was that, with the Court's current membership, the combined weight of Bork's vote and the intellectual influence that he might be expected to have upon the Court's deliberations would end the hope that the Court might continue to act as an agent of progressive social change, a role that many liberals had come to regard as among its most important.<sup>65</sup> A "moderate" in Justice Powell's image, someone inclined toward open-ended balancing of all the considerations bearing upon the issues brought to the Court, might be expected

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fully aired, but not their rebuttal." P. 150. And, of course, the charges were frequently repeated in settings — e.g., radio and television programs — of which no record remains.

62. See T. LOWI, *THE END OF LIBERALISM* (1969).

63. Interest groups understand, of course, that an unsympathetic Administration cannot be expected to appoint individuals who will forcefully advocate their interests, but the appointment of people whose views are antithetical to what they regard as their interests violates the unwritten rules of American politics. In this perspective, Bork's nomination might be seen as the equivalent of nominating Ralph Nader to head the Commerce Department or an outspoken opponent of affirmative action to be Assistant Attorney General for Civil Rights.

64. The obvious exceptions were, of course, affirmative action, on which the Court had not yet charted a firm course, and abortion.

65. To say that the coalition that conducted the campaign did not dwell on that fear is an understatement. It took considerable care to guard against drawing attention to its fears, even to the point of exacting from its members the ultimate sacrifice, an agreement that none would testify at the hearings and thereby risk exposure of their constitutional views. See pp. 300-01; M. PERTSCHUK & W. SCHAEZEL, *supra* note 8, at 226-34.

to cast a "politically correct" vote on at least some issues even if he or she were of a conservative bent. Bork, however, was guided by a constitutional theory that eschewed just such a role for the Court. His appointment thus threatened not just to slow the pace the Court had maintained in the Warren and early Burger years, as the appointment of a moderate would, but to bring it to a halt.

The rhetoric of the campaign was not, however, simply a *cri de coeur* expressing the fear and outrage that so many liberals felt at the prospect of Bork's appointment. Its tone and deceptions were more calculated. Almost immediately after the nomination, Michael Pertschuk (of *The People Rising*) co-authored a paper entitled *The Bork Nomination: Seizing the Symbols of the Debate*, which argued that "Bork must come to be seen as an extreme ideological activist serving as Reagan and Meese's political agent, dispatched to achieve what they could not achieve in Congress, with the result of changing the Constitution, uprooting four decades of settled constitutional precedents." The paper went on to suggest that the campaign should affix to Bork such labels as "judicial extremist," "judicial reactionary," "enemy of the Bill of Rights," and "right-wing ideologue" (pp. 156-57).

A poll sponsored by the coalition provided additional guidance. Among the conclusions drawn from it was that the public would regard the nomination "as increasingly unattractive the more Bork could be painted as someone with biases against groups or causes. It would not be enough to show that Bork was extremely conservative; he would have to harbor some kind of agenda" (p. 159). The pollsters went on to caution against too much substance: "To engage public opinion, Bork's opponents must keep their message clear, simple and direct. Again and again, we find that forays into constitutional law or judicial theory have the effect of impeding public understanding of the fundamental objections to Bork's nomination" (p. 159). An effort to avoid "impeding public understanding" by "forays into constitutional law or judicial theory" is, presumably, what accounted for the "clear, simple and direct" assertions in the coalition's ads.

The public, at which the campaign was aimed, did not, of course, have a vote on whether or not Bork should be confirmed. The decision was made by the Senate, whose members, it may be assumed, were less likely than the public to have been misled by the rhetoric, simplicities, half-truths, and untruths of the campaign. Senators, moreover, had the benefit of a record made by the Judiciary Committee at hearings that provided an opportunity to examine the nominee's record and to explore issues in more depth than is possible in a media campaign directed at the public. Extraordinary naiveté would be required, however, to imagine that the campaign, through its impact on public opinion, did not significantly influence the Senate vote or to

suppose, as Pertschuk and Schaetzel argue, that its primary influence was merely to free Senators from pro-confirmation pressures that would otherwise have prevented them from exercising independent and conscientious judgment.<sup>66</sup>

The Senate, it seems too obvious to point out, is a political body. Whether or not men are political animals, there is no doubt that Senators are. Politics suffuses the work of the Senate. It makes no sense to ask how the Senate, apart from politics, would have voted "on the merits," and then to ask, as a separate question, whether political considerations altered the outcome. Politics and "the merits" cannot be severed in that way.

In any event, the testimony of witnesses and, more especially, the "questioning" and comments of Committee members were often not markedly different in tone and quality from the campaign that was being waged on the outside. No doubt, the hearings also had another side. Legitimate questions were raised — about Bork's personal commitments<sup>67</sup> and intellectual characteristics,<sup>68</sup> the consistency of positions he had taken,<sup>69</sup> and his positions on a wide range of legal issues. Often, the discussion of those issues occurred at a level appropriate to their seriousness, without resort to populist rhetoric that would play upon the ignorance and fears of the public. Senate hearings, however, are not academic lectures or appellate court arguments. Especially when public interest has been aroused, shaping public opinion ranks high among their goals, with inevitable consequences for the tone and quality of the proceedings. Issues must be presented in a manner that is not only accessible to the public, but that will capture its attention. Bronner deftly captures the point, when he writes, in assessing Bork's testimony, that "Bork had not understood the nature of the proceeding. In fact, the nominee was getting it all wrong. He had prepared for a bench trial, but with the entire nation watching, this was a jury trial" (p. 226). Others did not make the same mistake.

The demagoguery of the campaign thus found its way into the hearing room. Even when inflammatory rhetoric was avoided, the

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66. M. PERTSCHUK & W. SCHAETZEL, *supra* note 8, at 251.

67. See, e.g., *Hearings*, *supra* note 3, at 2122, 2127 (testimony of John Hope Franklin): There is no indication — in his writings, his teachings, or his rulings — that this nominee has any deeply held commitment to the eradication of the problem of race or even of its mitigation. One searches his record in vain to find a civil rights advance that he has supported from its inception.

68. See, e.g., *Hearings*, *supra* note 3, at 2331, 2333 (testimony of Shirley Hufstедler): In examining Judge Bork's record as an academician, as a high-ranking member of the executive branch of the Federal Government, and as a judge, the evidence discloses his quest for certitudes to resolve the ambiguities of the Constitution and of the Supreme Court's role in constitutional adjudication, and an effort to develop constitutional litmus tests to avoid his having to confront the grief and untidiness of the human condition.

69. See, e.g., *Hearings*, *supra* note 3, at 713 (Sen. Arlen Specter questioning whether Bork's "expansive" views on executive power were consistent with his rejection of an expansive and evolving right to liberty).

message repeatedly conveyed at the hearings was that in constitutional law — indeed, in law generally — reasons are irrelevant. Only results count. Judicial decisions are to be assessed — and courts are presumably to decide cases — as though judges have unlimited authority to reach results consistent with the intuitive response of a public that has given no thought to the issues and is unaware of the full range of considerations bearing upon them. A few examples will illustrate the point.

Senator Howard Metzenbaum inveighed at length against the decision in *American Cyanamid*,<sup>70</sup> asserting that because women should not be forced to choose between sterilization and the jobs they want, Bork's failure to protect them from that choice was "shocking," "frightening" and "inhumane."<sup>71</sup> Former Congresswoman Barbara Jordan, with customary eloquence, explained to the Committee (and to the television audience) that her own political career had depended upon the Supreme Court's reapportionment decisions. Recalling that Bork had disapproved of the "'one person-one vote'" formula as a constitutional "'strait-jacket'" for which there is no "'theoretical basis,'" she commented, "Maybe not, gentlemen. Maybe there is no theoretical basis for one person, one vote, but I will tell you this much. There is a common sense, natural, rational basis for all votes counting equally."<sup>72</sup> The same theme pervaded Senator Kennedy's performance. As he stated in the peroration to his first round of "questions" to Judge Bork, by way of dismissing the latter's constitutional arguments regarding the limits of judicial authority, "Lawyers can always make technical points, but a justice ought to be fair."<sup>73</sup> Bronner canily observes that

[w]ith network cameras focused on him, Kennedy was playing Oliver North. He was appealing to the strong pragmatic, populist sentiment in the country, the kind that distrusted lawyers who "make technical points" and proceed to take away people's rights. His manner offended many intellectuals of both left and right. But Kennedy was not after their approval. He was aiming at a wider audience. [p. 226]

Bork's defeat produced euphoria among liberals across the nation. Others might think, as John Patrick Diggins has recently written, that "[a] victory won at the expense of the truth . . . was not liberalism's finest hour,"<sup>74</sup> but they had saved their Court from its most prominent critic. In doing so, however, they may also have changed the rules of the appointment process in ways that will prove less to their liking.

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70. See *supra* notes 54-56 and accompanying text.

71. *Hearings*, *supra* note 3, at 467-69.

72. *Hearings*, *supra* note 3, at 1004-05.

73. *Hearings*, *supra* note 3, at 158.

74. Diggins, *The Judge Pleads His Case*, N.Y. Times, Nov. 19, 1989, § 7 (Book Review), at 15.

Some pages ago, I suggested that the Bork controversy may have opened a new chapter in the Court's history, one in which nominations are, not always but often, the subject of campaigns that bear a strong resemblance to campaigns for political office.<sup>75</sup> The success of the campaign against confirmation demonstrates that citizens can be mobilized on the issue of Supreme Court appointments, and it seems quite plausible to suppose that presidents<sup>76</sup> and their political opponents<sup>77</sup> will each, at times, find it advantageous to do so. Increased public participation in the selection of justices is, for that reason, an all but inevitable consequence of the perceived importance of the Court's decisions and the influence that the personal views of the justices have upon those decisions. If that judgment is accurate, both the Court and proponents of an activist judiciary would do well to consider the wisdom of assigning to the Court the role that the latter envision for it, one in which, to recall Professor Tribe's words, "fundamental choices about what sort of society we wish to become turn on *who* sits on the Court."<sup>78</sup>

The lesson to be drawn from the Bork nomination, as I shall argue briefly in closing, is that an enlarged role for the public in the selection of the justices is likely to affect every stage of the process, from the identification of candidates to the choice of nominees, on into the hearings, and inevitably in the Senate vote on confirmation. The Court is, in brief, likely to become more deeply enmeshed in politics, threatening its ability (and that of inferior courts) to discharge responsibilities that are both central and uncontroversial within the American tradition.

In the course of a heated polemic published shortly before the commencement of the hearings, Renata Adler charged that Bork, "through his judicial opinions," had engaged in "a lobbying effort . . . for a position on the Court."<sup>79</sup> Pertschuk and Schaetzel point to Bork's speeches while a judge in support of a similar charge.<sup>80</sup> Because I lack their gift of reading other's minds, I shall withhold comment on the truth of these allegations. The allegations do, however,

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75. See *supra* text accompanying notes 35-39.

76. See *supra* text accompanying notes 21-22.

77. Among the motivations of some of those who opposed Bork's confirmation, as both *Battle for Justice* and *The People Rising* clearly reveal, was the belief that the controversy offered an opportunity to invigorate a liberal coalition that in recent years had fared poorly at the national level. See pp. 182, 186; M. PERTSCHUK & W. SCHAETZEL, *supra* note 8, at 230-31, 275-91. To recognize that motivation does not, of course, in any way impugn the sincerity of the stated grounds for opposing confirmation.

78. *Supra* note 4.

79. Adler, *Coup at the Court*, *The New Republic*, Sept. 14 & 21, 1987, at 48. ("Usually these missives were addressed to Attorney General Edwin Meese; in this single instance [an opinion supporting two columnists in a libel action], Bork addressed instead a vital instrument of that campaign, the press.") *Id.*

80. M. PERTSCHUK & W. SCHAETZEL, *supra* note 8, at 17.

suggest issues that deserve attention. Whether or not the belief is justified, the public utterances of prominent candidates for appointment to the Court are likely to be perceived by some as campaign speeches, a perception that significantly threatens public confidence in the judicial process. Perhaps, as I have argued elsewhere, sitting judges should avoid extra-judicial pronouncements bearing upon live legal issues,<sup>81</sup> but they can hardly avoid writing opinions, with the risk that those opinions will thereafter be understood as planks in a campaign platform rather than good faith efforts to decide cases according to law. The decisions of a sitting justice, similarly, may be understood as merely carrying out a campaign promise rather than a conscientious effort to carry out the responsibilities of the office.

More troubling than the potential erosion of public confidence in the judiciary is the possibility that the suspicions underlying it may be justified. Aspirants may campaign for a seat on the Court. Among the lessons of the Bork nomination, which in no way depends upon an assessment of his motivations, is that a high profile on controversial issues can constitute an effective campaign platform, creating a constituency favoring appointment.<sup>82</sup> Individuals have, of course, often campaigned for appointment, invoking sectional or partisan claims, calling in political debts owed to them or to those with whom they have connections, and so on.<sup>83</sup> The difference between a campaign conducted on such grounds and one based upon a platform constructed out of stands on controversial legal issues is, however, of some consequence. The latter, unlike the former, significantly threatens, if indeed it is not flatly inconsistent with, disinterested performance of the judicial office. A justice who has successfully waged a substantive campaign for appointment has made commitments that cannot lightly be set aside merely because he is now confronted with previously unanticipated arguments or because an issue looks different, as at times it will, after appointment than it did before.<sup>84</sup>

Equally troubling is the possibility that aspiration for higher office, and the knowledge that they may one day be called to account publicly for their performance, may influence the decision of judges on inferior courts. In some measure, of course, that risk is unavoidable. Judges, some of whom are ambitious, will be called upon to decide

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81. Sandalow, Book Review, 67 MICH. L. REV. 599 (1969) (reviewing A. FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE (1968)).

82. See *supra* notes 27-30 and accompanying text. Of course, it may, as the controversy over Bork demonstrates, also create opposition. That possibility, as every successful politician knows, only suggests the need for care in crafting a platform.

83. See, e.g., H. ASHMORE, UNSEASONABLE TRUTHS 193-99 (1989).

84. For celebrated instances of such changes, see, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring); and compare *United States v. United States District Court*, 407 U.S. 297 (1972) (Powell, J.) with Justice Powell's pre-appointment position on the same issue. P. 23. See also *What Nixon's Court Nominees Have Said About Key Issues*, U.S. NEWS & WORLD REPORT, Nov. 8, 1971, at 40-41.

controversial cases, and there is in the end no alternative to reliance upon their courage and integrity. The appropriate question is not whether those virtues will at times be required, but the frequency with which they will and whether the prospect of some day having to defend decisions in a public contest over appointment to the Court will exert a subtle influence on a judge's decisions. The campaign waged against Bork, at the least, suggests grounds for concern. After that campaign, for example, would an ambitious judge approach *American Cyanamid* in the same way he would have prior to the campaign? Might another such judge wonder whether it would be prudent to compute the percentage of cases in which she had voted with corporations and against individuals? The point of these questions is not to suggest that we can create a world free of such pressures, but that the pressures are greatly multiplied when the public participates in selecting justices. Professional politicians, whether or not they are lawyers, are likely to understand that legal issues are often complex and that judicial authority is limited. The general public does not, and as a result, the decisions of an inferior court judge are, as the campaign against Bork demonstrates, fodder for demagogues.

Increased public participation in the selection of the justices may, thus, significantly affect the behavior of candidates for nomination. It may also come to exert an influence on the qualifications for appointment. It might have been helpful, for example, if Bork were more telegenic. Indeed, prior to the hearings, several Senators informed the White House that Bork should shave off his beard. His "record was unsettling enough. He needed all the help he could get in looking all-American."<sup>85</sup> After the hearings, National Public Radio's influential law correspondent, Nina Totenberg, commenting upon the influence of television on the process, wrote: "If Robert Bork had looked like Cary Grant, perhaps the public would have responded less harshly, perhaps not. We will never know for sure. Television is a reality, however, and like it or not, we will have to live with it . . . ."<sup>86</sup>

Television, which is merely a way of referring to the need to appeal to a mass audience, may also demand other qualifications. Among Bork's failings at the hearings, nicely captured in Bronner's observation that he had prepared for a bench trial, not a jury trial (p. 226), was his inability to defend his positions in terms accessible to the public. The ability to communicate effectively with a mass audience, *e.g.*, to capsulize a position on a complex issue in a way that will make a

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85. P. 195. The White House rejected the idea, but only because "good packaging meant invisible packaging. Shaving off a twenty-year-old beard just before public hearings would draw more negative publicity than the beard itself." *Id.* Senator Heflin was sufficiently troubled about public reaction to the beard "and the way he [Bork] wears his hair" that he raised the issue at the hearings. P. 294.

86. Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213, 1221 (1988).



good "sound bite" on the evening news, has not heretofore been regarded as a qualification for appointment to the Supreme Court. Nor is its relevance to the Court's work very obvious. But it would surely have been useful to Bork, as it would be to any future nominee who has aroused public controversy. I do not mean to suggest that Bork would have been confirmed if he had been more skillful in this respect, or even that he would have if he had had greater skill and also looked "all-American." Perhaps he would have been, perhaps not. As Ms. Totenberg writes, "We will never know for sure." The point, rather, is that, to the extent that the public participates in the process of appointing members of the Court, the bases of selection will come to approximate those for selecting elected officials.

The need to justify a position in terms that are persuasive to the public is also likely to have substantive consequences. Some positions just are harder than their opposites to justify to a nonprofessional audience, especially when they are the subject of demagogic attack. They are not, for that reason, illegitimate, and they may even be preferable. Though some will regard it as impermissibly elitist to say so, it is folly to expect the public to understand and evaluate positions that depend upon knowledge it takes years to acquire and that are the product of reflection on an intellectual tradition. Bork's reasons for rejecting an "unstructured" right of privacy and his positions on anti-trust, for example, may or may not make for good law, but it is foolish to suppose that either can be evaluated by the public. The defense of such positions in a televised hearing is simply not likely to be successful, and the nominee who wishes to gain confirmation might well conclude that it would be best not to make the effort. Better to take positions that are likely to have greater public appeal or that will avoid hostile questions by potential adversaries on the Committee. Positions taken at the hearings are not, of course, binding subsequent to confirmation, but few successful nominees are likely to ignore them.

The increasingly probing character of the confirmation process significantly adds to the risk that members of the Court will be constrained by public positions taken prior to their appointment. Within the space of several decades the tradition that Supreme Court nominees did not testify at their confirmation hearings has yielded initially to an understanding that they would testify, but avoid comment on specific legal issues and then, in the Bork hearings, to an expectation that the nominee would discuss his judicial philosophy with sufficient particularity to permit the Senate and the public to understand its implications. Bork was accordingly drawn into discussion of quite specific legal issues, leading him to state positions that, had he been confirmed, would necessarily have embarrassed his performance as a member of the Court. To be sure, Bork's record made it unusually difficult for him to avoid being drawn into such discussions, but now that the precedent has been established, future nominees will not find

it easy to escape with the banalities and platitudes that have heretofore been regarded as satisfactory. There is no ready answer to the claim that the public and its senatorial representatives can meaningfully participate in the appointment decision only if they have information about the nominee on which to base a judgment.<sup>87</sup> Opponents and even those who are merely wary of a nominee will inevitably be led to test the latter's general statements by seeking to elicit additional information about his views.<sup>88</sup> Just how far the traditional proprieties will give way is still uncertain, but in an era dominated by mass communications, the public's "right to know" has become a nearly irresistible force. As every Senator knows, moreover, eliciting information is not the only purpose served by questions that are put to nominees. They are also a way of constraining a nominee's subsequent decisions.

Many of the concerns thus far expressed about the consequences of subjecting Supreme Court nominations to a test of popular approval might be substantially mitigated if it were likely that public discussion would be conducted at a level calculated to illumine the issues. The campaign waged against Bork does not suggest that public debate of that character can be expected.<sup>89</sup> The careful reader will have discerned that I do not admire that campaign nor much that occurred before the Judiciary Committee; indeed, that I deplore the excesses and distortions that characterized both. I deplore them, however, in much the same way that I deplore hurricanes, tidal waves, and earthquakes. Some years ago, in commenting upon complaints by defenders of the Warren Court against what may euphemistically be described as the "rhetorical excesses" of its critics, Professor Louis Jaffe wrote of the inevitability of public response to the decisions of a Court that "makes policy" — "not just the 'informed' criticism of law professors but the deep-felt, emotion-laden, unsophisticated reaction of the laity."<sup>90</sup> Jaffe was, I think, precisely right. These characteristics of public discussion seem to be an unavoidable feature of our political life, at least on those occasions when politics cuts deeply into issues about which feelings are intense. However distressing, they have come to be an expected part of the rough-and-tumble of democracy.

They are far more troublesome when they intrude upon the selection of judges.<sup>91</sup> The central justification for an independent judiciary

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87. *Id.*

88. Justice Kennedy's success in deflecting most questions that called for an expression of his views on controversial legal issues may be cited as demonstrating that the Bork hearings were atypical. However, Senate Democrats had reasons for avoiding a contest over Kennedy. It would, therefore, be a mistake to read very much into their failure to subject him to more intensive scrutiny.

89. Nor, it might be added, does our recent experience with campaigns for elective office.

90. See Jaffe, *Impromptu Remarks*, 76 HARV. L. REV. 1111, 1111 (1963).

91. Mark Tushnet's recent suggestion that "Judge Bork's supporters have objected to the

is its ability to operate at a remove from the passions of politics — to decide individual cases “on the merits” and, especially in constitutional cases, to take a longer view than is possible for those who are under pressure from an aroused public or from politically powerful groups. Yet, just because I regard these pressures as inevitable, my purpose in directing attention to the deplorable quality of public discussion during the Bork controversy is not mainly to criticize the participants, much less to suggest that the partisans on either side were primarily at fault.<sup>92</sup> It is, rather, to suggest that these characteristics of public debate over Supreme Court nominations may well be unavoidable if the Court remains in the vanguard of social reform, imposing constitutional solutions for controversial political issues even when those solutions lack a foundation in our constitutional traditions. The remedy for the ill-tempered and overheated debates on Supreme Court nominations that we have experienced over the past two decades is not to call futilely for more responsible debate, but appropriate restraint in the exercise of judicial power.

Academic discussion of the threat to judicial independence that an activist judiciary may produce has tended to focus on such direct attacks as the Roosevelt “Court-packing” plan and the “jurisdiction-stripping” bills that have been proposed in recent years. The greater threat, in my judgment, is that suggested by the controversy over the Bork nomination — which, it bears repeating, is merely an evolutionary step in a series of such controversies over the past twenty years. As the public and its leaders increasingly come to see the justices as political actors, whose function is not markedly different from that of other political actors, both the processes and bases of selection are likely to approximate, more and more closely, those for the selection of other political actors. If that occurs, no one — on either side of the debate over Judge Bork — will be very happy with the outcome.

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sort of political behavior that they expected Judge Bork to approve if confirmed,” Tushnet, *Principles, Politics, and Constitutional Law*, 88 MICH. L. REV. 49, 80 (1989), misconceives the premises underlying arguments for judicial restraint. The political process to which advocates of judicial restraint would have judges defer is not plebiscitary democracy, but a process in which public pressures are mediated by a complex set of institutions. See, e.g., Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1190-93 (1977). Moreover, one might regret certain tendencies in the political process without supposing that judges are competent to remedy them.

92. The President’s reasons for nominating Bork were, as I have already suggested, unlikely to have been qualitatively different from those that motivated Bork’s opponents. In view of the inertial force of presidential nominations, an appeal to the public, on terms that would generate public interest, was necessary if Bork were to be defeated. Nothing in our political history suggests that, if the situation had been reversed, the right would have been any less prone than the left was to employ the tactics that characterized the campaign. The disappointment, for some of us, was that the left proved to be no more immune to such tactics than the right has been.